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November 14, 2002

Via Hand Delivery

Ms. Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

Re: Written Ex Parte Presentation –
CC Docket Nos. 02-33, 96-45, 98-171,
90-571, 92-237, 99-200, 95-200, 95-116,
98-170 and NSD File No. L-00-72

Dear Ms. Dortch:

The National Rural Telecom Association (NRTA), the National Telecommunications Cooperative Association (NTCA) and the Organization for the Promotion and Advancement of Small Telecommunications Companies (OPASTCO) submit the accompanying legal memorandum to refute arguments revived recently in connection with the above-referenced proceedings. Some participants claim that the Commission may not assess contributions for universal service upon entities and individuals unable to receive support from the federal universal service mechanisms. The outline demonstrates that the plain language and structure of the universal service and eligible telecommunications carrier provisions of the Communications Act, as amended, the logical underpinnings of any universal service support program and decisions of this Commission and the Fifth Circuit require the Commission to recognize that the duty to contribute is not conditioned on whether a contributor can obtain universal service support.

U.S. District Court
District of Columbia

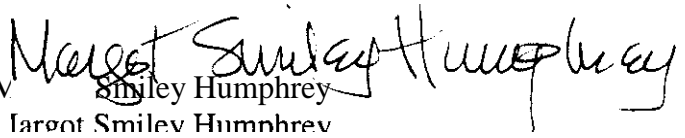
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November 14, 2002

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In the event of any questions concerning this matter, please let me know

Very truly yours,


M ^{Smiley} Humphrey
Margaret Smiley Humphrey

cc (via e-mail): Matthew Brill, Esq.
 Jordan Goldstein, Esq.
 Daniel Gonzalez, Esq.
 Christopher Libertelli, Esq.

WAS1 #1137167 v1

CONTRIBUTORS TO UNIVERSAL SERVICE SUPPORT NEED NOT BE ACTUAL OR POTENTIAL RECIPIENTS OF SUPPORT

Support from the broadest possible contributor base – including cable modem providers and self-providers of Internet access transmission service – is necessary to ensure that universal service support is sustainable:

This legal outline refutes renewed claims in universal service and broadband proceedings that the Commission cannot require contributions to support universal service from entities that are not able to receive support.

- A.** The plain language and structure of the Communications Act disprove the contention that only those that can receive support may be required to contribute.
1. §254(d) requires "every telecommunications carrier that provides interstate telecommunications services" to contribute and authorizes the FCC to require "any other provider of interstate telecommunications" to contribute "if the public interest so requires."
 2. §254(d) exempts a carrier from contributing only if its contribution would be "de minimis."
 3. §254(e) allows support for "only an eligible telecommunications carrier designated under Section 214(e)."
 4. §254(e) provides for support only to "a common carrier designated as an eligible telecommunications carrier" under a different section of the Act, and not even all common carriers are able to qualify
 5. The FCC may require any provider of interstate "telecommunications" to contribute, although only "telecommunications service" providers are "common carriers" able to qualify for universal service support.
 6. §254(i) provides for rate averaging by interexchange carriers, although local carriers receive support to moderate their access charges.
 7. The statutory provisions clearly authorize both statute-mandated common carrier contributions, regardless of ability to receive support, and discretionary Commission-ordered contributions from non-carrier providers that are, by definition, unable to receive support
- B.** The fundamental logic and history of universal service support conflict with the contention that only those that can receive support may be required to contribute.
1. The fundamental purpose of universal service support for high cost rural areas is and always has been to spread the higher cost of service in low density, low traffic volume areas over nationwide customers that have lower service costs.

2. Support before the Act was accomplished by separations that spread the costs of high cost areas over the nation's long distance customers by public policy driven allocations of interstate costs.
 3. Support via nationwide toll rate averaging, codified by the 1996 Act, also recovers more than their location-specific costs from interstate toll customers in low cost areas to keep rates affordable in high cost areas.
 4. The 1996 Act seeks to make "explicit" the support flows from lower to higher cost areas, carriers and customers – not to terminate or prevent necessary support flows from lower to higher cost areas, carriers and customers.
 5. Any universal service policy necessarily requires some carriers to collect and some customers to pay more than their localized below-average costs of service to allow others to collect and to pay less than their above-average costs.
- C. Consistent with the Communications Act, the Commission's universal service rules do not exempt non-recipients of support from contributing to federal universal service.
- The FCC's rules (with limited exceptions unrelated to receiving support):
- (a) require interstate telecommunications service providers (common carriers) to contribute under the §254(d) mandate, (§54.706(a)), and
 - (b) require "every provider of interstate telecommunications that offers telecommunications for a fee on a non-common carrier basis" to contribute under its discretionary §254(d) authority, (§54.706 (b)).
- D. Commission decisions have, from the outset, rejected claims that non-recipients of support are not required to contribute to universal service funding.
1. The Commission has rejected carrier claims to exemption on this basis. *See, e.g., Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, Report and Order, 12 FCC Rcd 8776, 1804 (1997) (Universal Service Order) (footnotes omitted):

[W]e disagree with commenters that suggest that the exemption criteria for carriers that are ineligible to receive support should be different from those applying to "eligible" carriers" ... Congress required all telecommunications carriers to contribute to universal service support mechanisms but provided that only "eligible" carriers should receive support, and gave no direction to the Commission to establish preferential treatment for carriers that are ineligible for support.
 2. The Commission pointed to carriers that contribute and are not eligible to receive support in *Federal-State Joint Board on Universal Service: Access Charge Reform, Price Cap Performance Review for Local Exchange Carriers, Transport Rate Structure and Pricing, End User Common Line Charge*, 13 FCC Rcd 5318, ¶263 (1997) (Fourth Order on Reconsideration):

Section 254(d) ... does not limit contributions to carriers eligible for universal service support. In fact, ... IXCs, payphone service providers, private service providers, and CMRS providers are required to contribute to universal service, even though they might not receive support from the high cost mechanism.

3. The FCC had further explained that " section 254 does not limit contributions to eligible telecommunications carriers" and that "[b]ecause not all providers of telecommunications services may be eligible to receive universal service support, we believe that the plain text of the statute contemplates that the universe of contributors will not necessarily be identical to the universe of potential recipients." *Federal-State Joint Board on Universal Service: Access Charge Reform, Price Cap Performance Review for Local Exchange Carriers, Transport Rate Structure and Pricing, End User Common Line Charge*, 13 FCC Rcd 5318 ¶289 (1997)
4. The Commission also justified support to non-carrier recipients under §254(h) by the principle that those required to contribute need not be recipients in *Federal-State Joint Board on Universal Service*, 13 FCC Rcd 1501, ¶184 (1998) (footnotes omitted):

Some commenters contend that providing support to firms other than telecommunications carriers violates the competitive neutrality requirement of section 254(h)(2)(A) because firms other than telecommunications carriers can benefit from support while only telecommunications carriers are required to contribute to that support. ... There is no requirement, however, that contributors to universal service mechanisms must also be permitted to receive support.

5. Therefore, the Commission's own decisions refute the claim that only entities able to receive support may or should be required to contribute to fund federal universal service support.

E. The 5th Circuit described with apparent approval the Commission's rejection of claims that support and contribution are linked.

The agency determined that to reduce the burden on individual carriers' prices, the carriers' contribution base should be as broad as possible ... Therefore, the agency ... rejected claims by certain carriers, which do not receive direct subsidies from the support program, seeking an exemption from making any contributions.

See, Texas Office of Public Utility Counsel v. FCC, 183 F.3d 393 (5th Cir. 1999) (citations and footnotes omitted).

F. The Commission recognizes that its authority to require contributions is implicated in its ability to adopt fair and consistent requirements for all broadband platforms.

The Commission is currently considering whether to require universal service contributions from cable modem providers and other providers of broadband Internet

access in *Appropriate Framework for Broadband Access to the Internet over Wireline Facilities, Universal Service Obligations of Broadband Providers, Computer III Further Remand Proceedings: Bell Operating Company Provision of Enhanced Services: 1998 Biennial regulatory Review – Review of Computer III and ONA Safeguards and Requirements, CC Docket Nos. 02-33, 95-20, 98-10, Notice of Proposed Rulemaking, FCC 02-42 (rel. Feb. 15, 2002).*

Conclusions:

1. The Communications Act and the Commission's implementing rules do not limit the requirement to contribute to universal service funding to carriers or others that can receive support. Thus, inability to receive support is not a legal obstacle to a requirement to contribute.
2. Congress could not logically have intended to restrict the FCC to requiring contributions only from entities that can receive support because no universal service support is possible without some participants paying more than they receive under the plan.
3. The Commission can and should require cable modem providers and self-providers of Internet access transmission service to contribute to further its policy of broadening the base of contributors:
 - to increase sustainability,
 - to reduce the assessment burden on individual carriers',
 - to minimize individual end users' surcharges,
 - to ensure competitive neutrality and
 - to foster competition.

I, MARGOTS. HUMPHREY, certify that the FCC Registration Number (FRN) listed below is true and correct to the best of my knowledge, information and belief.

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